No. 82-2056

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ESCONDIDO MUTUAL WATER COMPANY, CITY OF ESCONDIDO and VISTA IRRIGATION DISTRICT,

Petitioners,

v.

LA JOLLA, RINCON, SAN PASQUAL, PAUMA and PALA BANDS OF MISSION INDIANS and THE SECRETARY OF INTERIOR in his capacity as trustee for said Bands,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* COLORADO RIVER WATER CONSERVATION DISTRICT AND KINGS RIVER CONSERVATION DISTRICT IN SUPPORT OF PETITIONERS

DONALD H. HAMBURG
General Counsel
COLORADO RIVER WATER CONSERVATION DISTRICT
P.O. Box 1120
Glenwood Springs, CO 81601
(303) 945-8522

CHRISTOPHER D. WILLIAMS
Of Counsel
KINGS RIVER CONSERVATION DISTRICT
4886 East Jensen Avenue
Fresno, CA 93725
(209) 237-5567

ROBERT L. MCCARTY
Counsel of Record
GEORGE H. WILLIAMS, JR.
MCCARTY, NOONE & WILLIAMS
PROFESSIONAL CORPORATION
490 L'Enfant Plaza, East
Suite 3306
Washington, D.C. 20024
(202) 554-2955
Special Counsel for Amici Curiae Colorado River Water Conservation District Kings River Conservation District

September 21, 1983

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-2056

ESCONDIDO MUTUAL WATER COMPANY, CITY OF ESCONDIDO and VISTA IRRIGATION DISTRICT,

Petitioners,

v.

LA JOLLA, RINCON, SAN PASQUAL, PAUMA and PALA BANDS OF MISSION INDIANS and THE SECRETARY OF INTERIOR in his capacity as trustee for said Bands,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* COLORADO RIVER WATER CONSERVATION DISTRICT AND KINGS RIVER CONSERVATION DISTRICT IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST AND SUMMARY OF ARGUMENT

Your *amici*, the Colorado River Water Conservation District (CRWCD) of Colorado and the Kings River Conservation District (KRCD) of California are both political subdivisions of their respective states[1] and are both

[1] *See* Col. Rev. Stat. § 37-46-101 (1973 & Cum. Supp. 1981); and Cal. Water Code App. § 59-2 (1968 & Cum. Supp. 1983). This brief, therefore, falls within Rule 36.4 of this Court's Rules.

actively engaged in the development of hydroelectric projects as existing or potential licensees under the Federal Power Act (the "Act").[2] 16 U.S.C § 791a (1976 & Supp V 1981). These *amici* join in urging this Court to review the decision of the Ninth Circuit whose construction of the Act (1) dramatically reverses the underlying Congressional policy of encouraging hydroelectric power development by eliminating the primary jurisdiction of the Federal Energy Regulatory Commission ("FERC") to decide the conditions under which a project should be licensed; (2) does so in a context applicable to virtually all major hydroelectric projects in the western United States; and (3) invents a novel construction of implied reserved water rights for Indians as "reservations" under the Act, with possibly far reaching and dangerous effects in the sensitive water rights area. From the standpoint of power developers in the western states where federal lands are highly concentrated, that decision not only threatens to devastate future developmental efforts but creates substantial uncertainty with respect to the operation of existing projects and to the water rights that support them.

We make this submittal particularly mindful of the unusual circumstance that finds FERC, as the agent of Congress for the administration of the Act, barred from speaking on its own behalf and in defense of its proper construction of the Act.

---

[2] CRWCD has a license application pending before the Federal Energy Regulatory Commission in project number P. 2757, holds preliminary permits in P. 6644 and P. 5866, and has an application for a preliminary permit pending in P. 2779. KRCD holds licenses in P. 2890 and P. 2741.

ARGUMENT

I. The Ninth Circuit's construction of the Federal Power Act—imposing Secretarial dominion over the Commission—buries the fundamental Congressional purpose to have the Commission decide what constitutes comprehensive development of the Nation's waterpower resources

The Ninth Circuit panel majority holds that FERC, the agency responsible for project licensings under the Act, is bound under the plain terms of section 4(e) of the Act, 16 U.S.C. § 797(e), to accept any conditions to those licenses propounded by the department supervising any "reservation" allegedly affected by the project. Pet. App. 24. That ruling effectively grants reservation supervisors (here the Department of the Interior) a licensing veto since their unilaterally imposed conditions can render a project infeasible.

The majority's myopic reliance on the "plain meaning" canon has caused it to overlook the object of its effort—to ascertain the statute's purpose. *See, e.g., United States ex rel. Hill* v. *American Surety Co.*, 200 U.S. 197, 203 (1906) ("Statutes are not to be so literally construed as to defeat the purpose of the legislature"); *and see Chemehuevi Tribe* v. *FPC*, 420 U.S. 395 (1975) (where this Court considered the purpose of the Act in construing section 4(e)). The undisputed purpose of the Act is to encourage the development of the Nation's water power resources. *First Iowa Hydroelectric Coop.* v. *FPC*, 328 U.S. 152, 171, 180 (1946); *Chemehuevi Tribe* v. *FPC*, 420 U.S. at 404. *See* Brief in Opposition of Respondents La Jolla, Rincon, San Pasqual, Pauma and Pala Bands of Mission Indians (Bands Br.) at 8. Yet the panel holds that where judgments must be made with respect to reservations reconciling FERC's concern for the development of power against competing concerns raised by any of a

variety of departments, power development must always yield. This startling result turns the statute against itself. Congress surely did not spend almost a decade agonizing over water power development legislation that, by its own terms, would place collateral concerns over and above a power development deemed by FERC to be best adapted to comprehensive development of the water resources. Section 10(a) of the Act, 16 U.S.C. § 803(a).[3]

If the responsibility of FERC to determine the project best adapted to comprehensive development was truly to be subservient to the parochial concerns of all those other agencies, one would certainly expect to see some discussion to that effect in the Power Act's legislative history. Instead the legislative history, to which the majority below had access, is compellingly to the contrary.[4] It

---

[3] Nor does the majority's "literal" reading square with other language of the Act. Section 6, 16 U.S.C. § 799, allows that licenses "may be altered . . . upon the mutual agreement of the licensee and the Commission . . . ." It says nothing about the concurrence of the various other government departments. Thus under the majority's view, FERC and the licensee are bound to accept departmental conditions which, under section 6, they might later amend without departmental approval. Congress cannot be presumed to have written departmental vetoes into the Act in one place only to negate them elsewhere in that Act. *See American Textile Manufacturers Institute* v. *Donovan*, 452 U.S. 490, 513 (1981) ("we should not 'impute to Congress a purpose to paralyze with one hand what it sought to promote with the other,' " quoting *Clark* v. *Uebersee Finanz-Korporation*, 332 U.S. 480, 489 (1947)). *And see* Pet. App. at 154-55, where FERC rejected as unlawful Interior's effort to condition the license in this case so that the project could not be altered without Interior's approval.

[4] The majority ignores compelling legislative history to reach the sweeping conclusion that the Commission must accept Interior's conditions, yet relies heavily upon legislative history to support its equally sweeping holding on MIRA. Pet. App. 34.

pounds home the Congressional understanding that the Commission was expected to act independently on all questions, whether reservations were involved or not, save only for the approval of drawings for dams and other facilities affecting navigation by the Army's Chief of Engineers. This was true both when the Commission was composed of three Secretaries (War, Agriculture and Interior) from 1920-1930, and as the five-person independent Commission it has been ever since the Act was amended in 1930.

In the hearings underlying the 1930 amendments, when it was clear the three Secretaries were individually too busy to get the job done as a Commission, O.C. Merrill, as Commission Secretary and a major architect of the 1920 Federal Water Power Act, stated:

> [T]he three individual departments have what is called collateral jurisdiction. The Department of Agriculture has jurisdiciton over the national forests. The Department of the Interior has jurisdiction over the public lands, reclamation, withdrawals, and so forth. The War Department has jurisdiction over the navigable waters. In my opinion the best way to maintain the jurisdiction and interests of the three departments is to have the field work in so far as it relates to the issuance of licenses, originally handled as it has been ever since I have been with the Federal Power Commission, through the departments, *leaving the final decision to the Federal Power Commission. But the three departments have no final say in those matters.*

Hearings Pursuant to S. Res. 80 and on S. 3619 Before the Senate Committee on Interstate Commerce, 71st Cong., 2d Sess. 280-81 (1930) (emphasis added). Merrill continued (*Id.*, emphasis added):

> The Agricultural Department in such cases is cooperating with this new commission, and its officers are making reports upon certain projects, with

> recommendations to the Federal Power Commission. But there is where the responsibility ends. *The decision rests with the Federal Power Commission.*

Finally, in response to the suggestion that differences might also arise between the Commission and the War Department, Merrill added (*Id.*, emphasis added):

> The same thing is bound to come up at times. It came up while I was in the commission, and *we took the position that the commission's decision was final.* We do not always agree with the War Department, but ordinarily we did.

The Commission lawyer at the time was equally clear that the Commission, not some department, was to decide (*Id.*, at 358):

> The commission now has power to overrule the head of the department as to the consistency of a license with the purpose of any reservation.

So was the then Secretary of the Interior, Wilbur:

> I agree with Secretary [of Agriculture] Hyde that we can well allow these departments to be represented at hearings before the commission to present phases of departmental interests, rather than to have the control remain in the departments. Otherwise, even though you set up the commission, you will leave in the hands of the Secretaries, or in the hands of the bureau heads, the power to negate whatever the commission may want to do, that is, to ask the consent of the department involved.
>
> I cannot conceive of this Federal Power Commission really being effective unless it controls all power sites where it grants licenses, for if you have to ask the permission of this department or that department, there will be difficulties that will be absolutely impossible to overcome.

Hearings on H.R. 11408 Before the House Committee on Interstate and Foreign Commerce, 71st Cong., 2d Sess. 47-49 (1930).

In these circumstances there was no requirement for Congressional alteration of language that already had a well understood "plain meaning." *See United States* v. *Rutherford*, 442 U.S. 544, 554 n. 10 (1979) ("once an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned", quoting *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 487-489 (1940)). And the Commission operated under the language with precisely that understanding for over 60 years.

To hold otherwise, as has the panel majority below, wipes out all of that history and effectively deprives the Commission of the means to implement the duty placed upon it by Congress under section 10(a) to see that in the licensing of projects:

> [T]he project adopted . . . shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes . . . .

16 U.S.C. § 803(a).

We do not suggest that FERC is to ignore reasonable stipulations that may be proposed by the various departments. We do submit, however, that FERC was intended to be the ultimate arbiter of the *overall* public interest, including the assessment of all proposed departmental stipulations. The Ninth Circuit's result, on the other hand, puts a licensing veto in the hands of a number of departments, with no real ultimate authority assessed to

any of them. Judge Anderson recognized this in his dissent. Pet. App. 39-41.

It is no answer to suggest, as the majority does, that judicial review would cure any "unconditional veto power" otherwise granted to the departments. Pet. App. 24-25. To begin with, the panel had to retreat on rehearing from the utilization of judicial review under the Administrative Procedure Act as one control on Interior. Pet. App. 32-33. More importantly, however, section 313(b) of the Power Act, 16 U.S.C. § 825*l*(b), makes it clear that FERC is to make the threshold findings of fact, which are thereafter reviewed for sufficiency by the courts of appeals. It is not for the courts of appeals to assess *de novo* the reasonableness of proposed license conditions. *See FPC* v. *Idaho Power Co.*, 344 U.S. 17, 21 (1952); and *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973) (under a similar statutory scheme this Court explained that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court"). Moreover, we fail to see how there can be meaningful judicial review at all when FERC is forced to *deny* a license on the strength of a departmental recommendation. In that circumstance FERC would simply contend to the reviewing court that it was bound to accept the departmental recommendation, and, as apparently recognized by the majority on rehearing (Pet. App. 32-33), the department's action would not be subject to independent judicial review. There is thus a total lack of administrative as well as judicial due process; the applicant who is denied a license appears to have no recourse.[5]

---

[5] This is of no mere academic concern. For example, in Project No. 2757 (*see* note 2 *supra*), Interior made clear to the Commission its substantial interest in endangered fish studies, wild and scenic river

It is similarly mere semantics to advise, as the majority below does, that if the Commission does not like the conditions which some Secretary may hand it, it simply need not issue the license. This would be defeating the Congressional purpose to further water power development by just another route. It is for this reason as well that this jurisdictional impasse is presently ripe for this Court's review. The command of the majority below is plain—"the Commission must accept Interior's conditions". Pet. App. 23. A remand would be only a charade, leaving the Commission meanwhile facing an impossible burden of administration of the Act with its jurisdiction gutted and its existing licensees and current applicants fair game for special pleaders at any agency having a reservation interest to urge.

The licensing of a major hydroelectric project has never been a simple undertaking. It has, however, become more and more complex, to the point that under the National Environmental Policy Act alone, an application for a license has become a very substantial and expensive enterprise. The studies for and preparation of such an application, and seeing it through the procedural steps of scoping, environmental impact statement preparation, hearing, initial decision by an Administrative Law Judge, final decision by the Commission, rehearing and judicial review, involves millions of dollars. Applicants should not be remitted to this process unless they have a Commis-

---

studies and other concerns such that it doubted even the desirability of issuing a preliminary study permit, indicating there was every likelihood it would oppose construction. FERC granted the permit subject to studying Interior's concerns, and accepted an application for a license, now pending. If in similar circumstances Interior then opposes a license in asserted aid of a reservation, and if FERC must acquiesce in Interior's recommendation, what remedy would be available to the applicant?

sion with the ultimate authority to decide whether the project should be licensed under section 10(a). The disarray which the opinion below creates effectively discourages further development of a clean, renewable source of energy and should not be suffered without further examination by this Court.

The recent inventory of the hydroelectric potential of this country directed by Congress to be made by the Corps of Engineers shows that an enormous undeveloped resource remains, with 64,000 MW of hydro in being and 354,000 MW remaining. *National Hydroelectric Power Resources Study*, Vol XII at 4-16 (Sept. 1981). There are enough hedgerows in the way of realizing even a fair portion of this potential (including the Wild and Scenic Rivers Act, the Wilderness Act and the Endangered Species Act) without, in addition, converting the Commission with the responsibility for licensing such development into a paper shuffling rubber stamp designed as a conduit for Secretarial vetoes. While this impediment to development is of nationwide importance, it is clearly an urgent problem in the West where the impoundment of water to satisfy growing consumptive uses is a continuing need. The development of hydroelectric power at such sites to assist in repaying storage costs, let alone the plain common sense of utilizing the falling water as a resource for power, should have available the ultimate decision-making forum which Congress provided.

II. The court below has not only established Secretarial dominion, it has given Secretaries virtually boundless range to exercise that dominion, particularly in the sensitive area of rights to the use of water

The decision below is not only wrong, it is exceedingly far-reaching. The decision applies to all licenses within or possibly affecting "reservations", a term broadly defined

in the Act to include federal land reserved from private appropriation and "held for any public purpose." 16 U.S.C. § 796(2).[6] Hundreds of existing federally licensed projects utilize federal lands and reservations;[7] and of the potential new hydroelectric capacity, the great majority is located in the western United States where federal reservations are also concentrated. *See National Hydroelectric Power Resources Study*, Vol. XXII at 1-2 (Sept. 1981).[8]

Beyond that, the Ninth Circuit now holds that water rights downstream of and outside the project boundary are "reservations." Pet. App. 25-28. The court reached this view, notwithstanding the fact that section 4(e) of the statute is expressly applicable only to licenses "within"

---

[6] Under the Act,

> "reservations" means national forest, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks.

It may be noted that this full text, with its wide-open penultimate clause, was not included in the opinion below. Pet. App. 25.

[7] FERC's counsel indicated at the oral argument below that over 600 federal projects utilize federal lands and reservations.

[8] The Bands concede that, as regards the question of Secretarial dominion over FERC, the decision below might "have a broad[] impact," but suggest that "there is no reason to expect [inter-agency] conflicts to increase in the future." Bands Br. 24-25. To the contrary, initial license and relicense applications before FERC have dramatically increased in recent years, and areas of potential inter-agency conflict have exploded with the recent advent of the environmental statutes mentioned earlier (p. 10). The result, evident in this case, is that increased Secretarial participation and inter-agency conflict can be expected in FERC licensing proceedings, particularly if this case is permitted to stand.

reservations, on the ground that the implied reservation of water rights under *Winters* v. *United States*, 207 U.S. 564 (1908), constitutes "a reservation" within the meaning of the Act.

Winters does establish that rights to the use of water were impliedly reserved by the United States at the time of the establishment of an Indian reservation. The existence of such rights, however, which are of course subject to measurement and proof, as in *Arizona* v. *California*, 373 U.S. 546, 596-97 (1963), does not automatically convert such rights into a "reservation" within the meaning of section 3(2) of the Act. This magic leap was made below in order to find that the project involved was within all six of the reservations, it being clear on the facts that the project boundaries lay only partially within the geographic boundaries of three of the six reservations. Since the water rights of the other three reservations might be affected by the project, situated as they are below the project in the San Luis Rey River watershed, the court elected to find that the water rights were reservations within the meaning of the Power Act and thus subject to such conditions as the Secretarial proprietor of the reservations might deem necessary. There was no requirement, nor is there justification, for this strained and novel interpretation.

The question of the right to the use of waters among the parties involved is already in litigation in a United States District Court having jurisdiction over the controversy. FERC has historically abstained from making any determinations with respect to water rights. Pet. App. 99. Recognizing that it has no jurisdiction to declare rights in this very important and sensitive area, FERC included within the license for the Escondido project a condition which would permit it to modify the license as

appropriate to recognize the disposition of the water rights litigation. Pet. App. 259. There was accordingly no need to strain for the interpretation made by the court.

If Indian water rights are a reservation within the meaning of the Act, simply because they are appurtenant to a reservation specifically provided for in the statutory definition, then any other water rights falling within the implied reservation doctrine may well be argued as entitled to the same treatment. And, according to the court below, such "reservation" need not be "within the reservation" as is required by the language of section 4(e). Putting to one side the fact that the very language of the first proviso of section 4(e) as to reservations obviously does not embrace water rights, existing licensees, pending license applicants and those preparing applications are faced with the possibility of having the operations of their projects further hobbled by such conditions with respect to releases of water as whatever Secretary may be involved feels necessary in order to accommodate an alleged reserved right. This might, for example, be asserted on behalf of a wilderness study area, a wild or scenic river study section, a fish and wildlife refuge or whatever other "reservation" might be asserted to exist, and presumably, however far downstream it might be from the project involved. Again there would be the spectacle of FERC being placed in the position of requiring a licensee to deliver quantities of water to meet Secretarial conditions, the rights to which could very well be in dispute and which had never been adjudicated. Indeed, Secretarial claims might well have been denied in State water adjudication proceedings, and nevertheless be binding on FERC if pushed in that forum.

Courts should be circumspect about declaring interpretations that are unnecessary for the purposes of a particular case and that can only bring mischief in their further application. *Barr* v. *Matteo*, 355 U.S. 171, 172 (1957). This is particularly true in the delicate area of water rights, which have always been of critical importance in the West and which are becoming increasingly significant throughout the Nation. The court below, in fashioning a construction to assist the Indian reservations downstream unfortunately overlooked the fact that reservations are legion, and under the court's broad language may be argued as even more universal. While there of course must be concern for possible Indian entitlements, this must not be to the exclusion of all other rights and obligations which might be involved. The holdings of this Court during the past term in *Arizona* v. *California*, 51 U.S.L.W. 4325 (March 30, 1983), *Nevada* v. *United States*, 51 U.S.L.W. 4975 (June 24, 1983), and *Arizona* v. *San Carlos Apache Tribe* (the McCarran Act cases), 51 U.S.L.W. 5095 (July 1, 1983), gave recognition to the protection of such rights in the context of the water rights of all who might be involved. Here it is not only straining unnecessarily to include implied reserved rights within the technical meaning of "reservation" under the Federal Power Act, but it exposes numerous existing licensees as well as pending license applicants to an incredible unknown obligation against their projects which is totally unwarranted.

We, of course, do not agree with the Ninth Circuit's broad expansion of "reservations"; but if it is allowed to stand, the scope of departmental vetoes could expand exponentially to apply to any license *affecting* federal lands—virtually all major projects in the western United States. On that basis alone this Court's review is warranted.

CONCLUSION

The Court should review this case to resolve the intragovernmental jurisdictional clash under the Federal Power Act which goes to the heart of that Act's purpose to provide for the comprehensive development of the Nation's hydroelectric power resources. The Ninth Circuit would resolve that clash by denuding the Act's administrator and demoting power developmental concerns to the concerns of reservation supervisors. That decision is not only at odds with the Act, it is of unnecessarily far reaching implication, as it overstrains the *Winters* doctrine of implied water reservations in order to expand the reservation supervisors' sphere of influence under the Act.

Since resolution of this jurisdictional dispute is fundamental to the continued proper administration of the Act and in view of the strong Congressional concern for the proper development of the Nation's water power resources reflected in that Act, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

DONALD H. HAMBURG
General Counsel
COLORADO RIVER WATER
CONSERVATION DISTRICT
P.O. Box 1120
Glenwood Springs, CO 81601
(303) 945-8522

CHRISTOPHER D. WILLIAMS
Of Counsel
KINGS RIVER CONSERVATION DISTRICT
4886 East Jensen Avenue
Fresno, CA 93725
(209) 237-5567

ROBERT L. MCCARTY
Counsel of Record
GEORGE H. WILLIAMS, JR.
MCCARTY, NOONE & WILLIAMS
PROFESSIONAL CORPORATION
490 L'Enfant Plaza, East
Suite 3306
Washington, D.C. 20024
(202) 554-2955
Special Counsel for Amici Curiae
Colorado River Water
Conservation District
Kings River Conservation District

September 21, 1983